85-605

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAUL C. VILLANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ARTHUR M. SCHWARTZ, P.C.
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75 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err in applying the wrong standard in denying Petitioner's motion for an evidentiary hearing under 28 U.S.C., Section 2255?

2. Did the District Court err in denying Petitioner's motion for an evidentiary hearing where facts relating to the existence of the plea agreement were contained outside of the record?

3. Did the District Court err in finding the terms of the plea agreement were followed where evidence presented by Petitioner indicated there was, in fact, a breach of the plea agreement by the Government?

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

PAUL C. VILLANO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Paul C. Villano, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on May 2, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals was entered on May 2, 1985 and is attached hereto in the Appendix at p. Al. This opinion was not selected for official publication and is not reported.

The judgment and order of the United States District Court for the District of Colorado is not reported. It is reprinted in the Appendix at P. A7.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on May 2, 1985. A timely petition for rehearing and request for rehearing *en banc* was denied on July 12, 1985. This Petition for Certiorari was filed within 90 days of that date.

Petitioner seeks review of the Tenth Circuit Court of Appeals' decision upholding the judgment of the United States District Court which denied Petitioner an evidentiary hearing and all relief requested pursuant to 28 U.S.C. Section 2255. Therefore, this Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 2101(c). *See Heflin v. United States*, 358 U.S. 415, at 418 n.7 (1959).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution Fifth Amendment:

> [N]or shall any person be deprived of life, liberty, or property without due process of law.

United States Constitution Fourteenth Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 United States Code, Section 2255:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of

the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

On October 4, 1982, the Petitioner, Paul C. Villano, pleaded guilty to three felony counts in the Federal District Court for the District of Colorado pursuant to a plea agreement. On December 6, 1982 Petitioner was sentenced. Petitioner later filed a motion for reduction of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure, which motion was denied on April 4, 1983. On May 25, 1983, Petitioner Villano filed a petition to set aside sentence pursuant to 28 U.S.C. Section 2255, and on October 20, 1983, Petitioner requested an evidentiary hearing on his petition. On November 2, 1983, the district court ordered

both sides to file affidavits. On February 6, 1984, the district court heard oral arguments on the Petitioner's petition for relief under 28 U.S.C. Section 2255. On February 7, 1984, Petitioner filed a second request for evidentiary hearing. On March 16, 1984, the district court entered orders denying Petitioner's petition to set aside sentence pursuant to 28 U.S.C. Section 2255 and Petitioner's requests for evidentiary hearing.

Petitioner appealed from these two orders to the United States Court of Appeals for the Tenth Circuit. On May 2, 1985, the Tenth Circuit affirmed the orders of the district court. Petitioner's petition for rehearing and suggestion for rehearing *en banc* was denied on July 12, 1985. Petitioner, Paul Villano, now appeals the Tenth Circuit's affirmance of the district court's two orders.

It is Petitioner's position that the district court erred in denying an evidentiary hearing on his Section 2255 petition and in denying the petition. The petition to set aside sentence alleged that the government violated the plea agreement by failing to remain silent concerning Petitioner's sentence and recommending that Petitioner receive the maximum sentence.

The plea agreement which is the subject of this appeal was the result of extensive plea negotiations. On September 17, 1984, Petitioner signed a statement in advance of plea of guilty which tentatively stated that a plea agreement had been reached. However, counsel for the Petitioner, Arthur M. Schwartz, requested a clarification of certain terms of the plea agreement in a letter to David B.B. Helfrey, United States Attorney, dated September 28, 1982, before any formal guilty plea had been entered before the district court. *See* Appendix, p. A25. In relevant part, the letter stated:

I have reviewed the documents given to me by you concerning the plea agreement of Paul Villano.

Pursuant to that agreement I direct your attention to paragraph 11 which represents to the Court that the only agreement entered into by the parties is as set forth in that paragraph.

Upon due reflection it would appear to me that there should be fully disclosed to the court the nature and extent of all agreements entered into between Mr. Villano and the government so that the court will be fully apprised and those agreements enforceable.

To this end, it would appear to me that the following additional disclosures be made to the court:

* * * *

5. That you will take no active part in opposing any sentence entered by the Court other than to present to the Court the sentencing memorandum previously tendered to Mr. Villano.

* * * *

It would seem to me that unless these items are in fact spelled out in paragraph 11 that the Court does not have notification of the extent of the agreement and quite frankly the agreement cannot in any way be used as protection for my client to prevent future problems from arising.

I therefore would urge you since the matter is most urgent to review these items so that they may be included in paragraph 11 of the Statement by Defendant in Advance of Plea.

The response of the United States Attorney, Mr. Helfrey, of September 29, 1982 clarifies the terms of the tentative plea agreement p. A28. The full pertinent portions of this three page letter read as follows:

> In regards to your [September 28, 1982] letter, I certainly share your belief that all matters which are part of the plea bargain reached by your client, Paul Villano, and the Government should be made available to the court pursuant to Rule 11, Federal Rules of Criminal Procedure. It is the Government's understanding, however, that none of these matters are part and parcel of the plea agreement. It is further my understanding after our discussion of this date that you concur in this view.
>
> Let me, however, address each item raised by you and formally state the Government's position.
>
> * * * *
>
> Item 5 concerns the exercise of sentencing discretion by the United States District Court. As indicated, the Government will not recommend any specific sentence or oppose any specific sentence. The Government will, of course, file its Sentencing Memorandum and will be prepared to defend the allegations contained therein.
>
> * * * * *
>
> Hopefully, the above clarifies the points raised in your letter. If you desire to discuss these matters any further, as always, I am at your service.

At arraignment on October 4, 1982, Mr. Schwartz on the record expressly incorporated the aforementioned letter into the plea agreement:

> **MR. SCHWARTZ:** If your Honor please, concerning paragraph 1 which sets out the government's agreement with the defendant Paul Villano, I took it upon myself to confer with the United States Attorney's office because I did not feel that it adequately

> reflected the agreement that was entered into by the parties. In doing that I propounded specific questions to the United States Attorney by letter and which Mr. Helfrey then responded in kind. That letter is dated September 29, 1982, and I can either recite the general terms of it to the Court or file the letter with the court, whichever the court chooses. (sic)
>
> **THE COURT:** I would like to know what the general terms are and I would like a copy placed of record.
>
> Appendix, p. A37.

At no time did the government object to the inclusion of the September 29 letter as a part of the plea agreement. However, due to negligence or oversight, neither party notified the district court of Item 5 of the September 29 letter that contained the government's representation that it would remain silent at sentencing, nor was the letter filed with the court.

Mr. Schwartz, counsel for the Petitioner, made further inquiries regarding a possible misunderstanding regarding the government's motion for disclosure of tape recordings in a letter to United States Attorney, Robert Gay Guthrie on October 15, 1982. *See* p. A32. In pertinent part the letter states:

> I am also concerned that the order reflects that [the tape recordings] may be used by 'counsel and the court.' It is my understanding that the government in the plea bargain with Mr. Villano has agreed that it will take no position on sentencing other than the written sentencing report heretofore filed with the court.
>
> I therefore fail to understand, absent a contested evidentiary hearing, why that language appears in the order forwarded to me. I therefore would appreciate it if you would clarify same so that we will have no misunderstanding concerning same.

In a cryptic response, the government, through Mr. Helfrey, stated the following in a letter dated October 20, 1982 Appendix, pp. A33-34:

> The purpose of the language authorizing the Government to make use of the electronic surveillance materials is in the event that the Government Sentencing Memorandum is challenged by your client. As agreed, the United States is prepared to defend the accuracy of the Sentencing Memorandum. As your letter acknowledges, and to which the Government agrees, no recordings or evidence will be adduced by the Government at the sentencing of your client absent a contested evidentiary hearing.
>
> I believe this position is in accordance with our preexisting understanding.

However, contrary to the previous representations of the government, at sentencing United States Attorney Robert Miller recommended that the Petitioner be given the maximum sentence:

> **MR. MILLER** [U.S. Attorney]: Therefore, the government's position is that these gentlemen ought to be given the maximum sentence of 13 years and $20,000. Thank you.
>
> **MR. WYRSCH** [Counsel for co-Defendant Clarence Smaldone]: Your Honor, I think we need approach the bench.
>
> **THE COURT:** All right.
>
> (Whereupon, there was a discussion on the record had at the bench, to-wit:)
>
> **MR. WYRSCH:** Your Honor, plea bargaining in this case no (sic) specifically mentioned that the government would remain mute to sentence—
>
> **THE COURT:** I don't remember that as part of the plea bargain.

MR. SCHWARTZ [Counsel for Appellant, Paul Villano]: It was my understanding, your Honor, that unless we contested the sentencing memorandum filed with the government to the end that we put on evidence contradicting it that the government would stand mute.

THE COURT: I don't find anything in the plea agreement that I have before me that indicates that. As far as I am concerned the government has its right under the rule, and they have done nothing more than exercise that right. I don't think anything they have done is contrary to the plea agreement that I have before me. Thank you, gentlemen.

See Appendix, pp. A40-42.

Petitioner brought a petition under 28 U.S.C. Section 2255 to set aside the breached plea agreement and allow Petitioner either a rehearing concerning sentencing, or an opportunity to withdraw his plea and proceed to trial. As authority for this petition, Petitioner relied on this Court's decision in *Santobello v. New York*, 404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971).

In connection with Mr. Villano's petition under 28 U.S.C. Section 2255, the Petitioner requested an evidentiary hearing to develop the facts and circumstances surrounding the breached plea agreement. After hearing arguments of counsel on Petitioner's motion for an evidentiary hearing, the district court, in an order dated March 16, 1984, denied the motion for an evidentiary hearing and dismissed the petition under 28 U.S.C. 2255.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT APPLIED THE WRONG STANDARD IN DENYING PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING

28 U.S.C. Section 2255 provides, *inter alia*, that:

> *Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief*, the court shall, cause notice thereof to be served upon the United States Attorney, *grant a prompt hearing thereon*, determine the issues and make findings of fact and conclusions of law with respect thereof. (Emphasis added).

In the instant case, Petitioner, Paul C. Villano, petitioned the district court for relief and an evidentiary hearing pursuant to 28 U.S.C. 2255 to show that the United States Attorney's Office had violated a plea agreement, entered into with Villano. The district court, in response, denied the petition and request for an evidentiary hearing stating:

> Since I have concluded the *best evidence* of the plea bargain is set forth in the evidence already before me, I find no need for an evidentiary hearing. See Appendix, p. A9 (emphasis added).

However, the application of a "best evidence" standard by the court contravenes the express language of the statute as well as the repeated statements of this Court. Under 28 U.S.C., Section 2255 the files and records of a case must *conclusively* show Petitioner is entitled to no relief in order for the court to refuse to grant an evidentiary hearing. Since the district court failed to use this standard anywhere in its order, it is clear the court erroneously applied a "best evidence" standard.

This Court has repeatedly held that an evidentiary hearing must be ordered unless, viewing the petition against the record, its allegations do not state a claim for relief or are so "palpably incredible" or so "patently frivolous or false" as to warrant summary dismissal. *Blackledge v. Allison*, 431 U.S. 63, 67, 52 L.Ed.2d 136, 97 S.Ct. 1621 (1977); *Fontaine v. United States*, 411 U.S. 213, 36 L.Ed.2d 169, 93 S.Ct. 1461 (1973); *Machibroda v. United States*, 368 U.S. 487, 7 L.Ed.2d 473, 82 S.Ct. 510 (1962). Thus, under 28 U.S.C., Section 2255, an evidentiary hearing is mandatory whenever the record does not affirmatively manifest the factual or legal invalidity of the Petitioner's claims. *Baumann v. United States*, 692 F.2d 565, 571 (9th Cir. 1982); *Sosa v. United States*, 550 F.2d 244, 250 (5th Cir. 1977).

In the instant case, the district court failed to apply any of these standards in denying Petitioner's request for an evidentiary hearing. The court refused to grant an evidentiary hearing merely on the grounds that the "best evidence" of the terms of the plea agreement existed within the record. Thus, the district court failed to apply the proper standard in determining whether the Petitioner was, in fact, entitled to an evidentiary hearing under 28 U.S.C. 2255.

II. PETITIONER IS ENTITLED TO RELIEF PURSUANT TO 28 U.S.C. SECTION 2255

A. The Allegations Of A Broken Plea Agreement State A Legal Claim For Relief Under 28 U.S.C., Section 2255

Petitioner, Paul C. Villano, alleged that the government violated the provisions of the plea agreement that it was to remain silent at sentencing. These allegations, if proven,

clearly entitle the Petitioner to relief under the authority of *Santobello v. New York*, 404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971) which is almost precisely on point with the allegations contained in the petition.

In *Santobello*, the defendant was initially charged with two felonies. After plea negotiations, the defendant agreed to plead guilty to a single count of a lesser included offense. In exchange, the prosecutor agreed to dismiss the original two counts and make no recommendation as to the sentence. However, at sentencing, another prosecutor did, in fact, recommend the maximum sentence. Defendant counsel immediately objected that the prosecutor's statement was a violation of the plea agreement. The judge, however, in imposing the maximum sentence, stated that the prosecutor's recommendation did not influence him in any respect.

Upon review, this Court unanimously held that the breach of the plea agreement entitled the defendant to relief. In writing for the Court, Chief Justice Burger stated:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that *when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can* be said to be part of the inducement or consideration, such promise must be fulfilled.
>
> On this record, petitioner 'bargained' and negotiated for a particular plea in order to secure dismissal of more serious charges, but also on condition that no sentence recommendation would be made by the prosecutor. It is now conceded that the promise to abstain from a recommendation was made, and at

> this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial. The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hard is doing' or has done. That the breach of agreement was inadvertent does not lessen its impact.
>
> We need not reach the question whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea. He stated that the prosecutor's recommendation did not influence him and we have no reason to doubt that. Nevertheless, we conclude that *the interets of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case* to the state courts for further consideration. (Emphasis added). *Santobello v. New York, supra*, 404 U.S. at 262-263.

See also Mabry v. Johnson, ____ U.S. ____, 81 L.Ed.2d 437, 104 S.Ct. 2543 (1984)

Petitioner's allegations in the instant case are almost precisely on point to the situation presented in *Santobello*. Here, Mr. Villano entered into a plea agreement with the United States Attorney's office after extensive negotiations. Petitioner agreed to plead guilty to three charges in exchange for concessions by the government which include a promise that the government would not recommend any specific sentence or oppose any specific sentence. The government would be allowed to file a sentencing memorandum, and would also be permitted to defend the allegations contained in that memorandum if their accuracy was challenged by Mr. Villano. However, at sentencing, the United States Attorney, as in *Santobello*, violated the plea agreement by recommending the Petitioner be given the maximum sentence.

Under these circumstances, Petitioner is entitled to the same relief granted by this Court in *Santobello*. Thus, the petition under 28 U.S.C. 2255 states a legitimate legal claim upon which relief could be granted.

B. Petitioner Is Entitled To An Evidentiary Hearing Since Disputed Factual Issues Exist

As stated previously, 28 U.S.C. Section 2255 expressly provides that an evidentiary hearing "shall" be granted "[u]nless the *motion and the files and records* of the case *conclusively* show that the prisoner is entitled to no relief." 28 U.S.C. Section 2255 (Emphasis added). Petitioner need only make specific factual allegations that will entitle him to relief. *United States v. Hearst*, 638 F.2d 1190, 1194-1195 (9th Cir. 1980) *cert. denied*, 451 U.S. 938 (1981).

A corollary of these principles is that where the Petitioner presents affidavits concerning events outside the record, an evidentiary hearing will be granted. This Court in *Machibroda v. United States*, 368 U.S. 487, 7 L.Ed.2d 473, 82 S.Ct. 510 (1962) stated:

> The statute requires a District Court to 'grant a prompt hearing' when such a motion is filed, and to 'determine the issues and make findings of fact and conclusions of law with respect thereto' unless 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.' This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the 'files and records' in the trial court. *The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record* could therefore cast no real light. *Machibroda vs. United States*, 368 U.S. at 494-495. (Emphasis added).

Several federal cases have held that an evidentiary hearing must be granted when a 2255 petition alleges facts concerning a broken plea agreement that are outside the record. *United States v. Carbone*, 739 F.2d 45 (2d Cir. 1984); *United States v. McCord*, 618 F.2d 389 (5th Cir. 1980); *United States v. Rapp*, 539 F.2d 1156 (8th Cir. 1976); *Dugan v. United States*, 521 F.2d 231 (5th Cir. 1975).

In the instant case, correspondence between the United States Attorney and Petitioner's counsel reveal matters concerning the plea agreement that are not contained in the record. The Petitioner's position is further corroborated by affidavits by the Petitioner and his counsel, as well as the objections of a co-defendant's counsel at sentencing.

Furthermore, the government introduced four affidavits of its own putting into issue the allegations in Petitioner's petition. Essentially these affidavits place into issue the credibility of all the parties. Where credibility becomes an issue in proceedings under 28 U.S.C. Section 2255, an evidentiary hearing is almost always necessary to fully explore that issue. As the United States Supreme Court stated in *Blackledge v. Allison*, *supra*:

> [B]efore dismissing facially adequate allegations short of an evidentiary hearing, ordinarily a district judge should seek as a minimum to obtain affidavits from all persons likely to have firsthand knowledge of the existence of any plea agreement. *See Walters v. Harris*, 460 F.2d [988] at 992 [4th Cir.] "'When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful.'" Advisory Committee Note to Rule 7, Rules Governing Habeas Corpus Cases, 28 USCA (1977 Supp.), p. 341 *quoting Raines v. United States*, 423 F.2d 526, 530 (CA4). *Blackledge v. Allison*, *supra*, 431 U.S. at 82, fn. 25 (Emphasis added).

See also United States v. McCord, supra; United States v. Rapp, supra. Thus, the district court's dismissal of the petition without any evidentiary hearing was inappropriate where issues of credibility have been raised by conflicting affidavits filed by Petitioner and the government.

Even more significant is the principle that once an issue of fact has been established to exist under 28 U.S.C. Section 2255, that issue cannot be resolved solely on the basis of affidavits. *See Miller v. United States*, 564 F.2d 103 (1st Cir. 1977). In the instant case, both sides have filed affidavits raising genuine issues of fact concerning the understanding of the terms of the plea agreement. These affidavits also raise the issue of the credibility of the other side. On these grounds alone Petitioner is entitled to an evidentiary hearing under 28 U.S.C. Section 2255.

Moreover, these issues of fact cannot be resolved in the government's favor solely on the basis of *ex parte* government affidavits. Petitioner must be afforded the opportunity in an evidentiary hearing to challenge these statements on behalf of the government and introduce testimony and evidence supporting his contention that the plea agreement was violated. Since the Petitioner has raised genuine issues of fact concerning events occurring beyond the scope of the record, Petitioner is clearly entitled to an evidentiary hearing pursuant to 28 U.S.C. 2255.

C. Appellant Is Entitled To Relief Pursuant to 28 U.S.C. Section 2255

In *Santobello v. New York*, 404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971), this Court's endorsement of plea bargaining *"presuppose[d] fairness* in securing agreement between an accused and the prosecutor." 404 U.S. at 261 (Emphasis added). *See also Mabry v. Johnson*, ____

U.S. ____, 81 L.Ed.2d 437 (1984). This fairness requirement mandates that "the most meticulous standards of both promise and fairness must be met by prosecutors engaging in plea bargaining." *Correole v. United States*, 479 F.2d 944, 947 (1st Cir. 1973). *See also United States v. Bowler*, 583 F.2d 851, 854 (7th Cir. 1978); *Palermo v. Wardon*, 545 F.2d 286, 296 (2d Cir. 1976) *cert. denied*, 431 U.S. 911 (1976); *Geisser v. United States*, 513 F.2d 862, 863 (5th Cir. 1973) *cert. denied* 450 U.S. 1031 (1981).

An examination of the record of the case indicates beyond a reasonable doubt that the government breached the plea agreement as well as its obligation of fairness. Thus, Petitioner is not only entitled to an evidentiary hearing, but to the full relief requested in the petition under 28 U.S.C. 2255.

The most significant portion of the record that shows a violation of the plea agreement is the letter from the United States Attorney David B. Helfrey dated September 29, 1982, that was expressly incorporated into the plea agreement at the arraignment on October 4, 1982. Then, the following dialogue took place:

> **MR. SCHWARTZ:** If your Honor please, concerning paragraph 1 which sets out the government's agreement with the defendant Paul Villano, I took it upon myself to confer with the United States Attorney's office because I did not feel that it adequately reflected the agreement that was entered into by the parties. In doing that I propounded specific questions to the United States Attorney by letter and which Mr. Helfrey then responded in kind. That letter is dated September 29, 1982, and I can either recite the general terms of it to the Court or file the letter with the Court, whichever the Court choses. (sic)

> **THE COURT:** I would like to know what the general terms are and I would like a copy placed of record.
>
> Appendix, p. A37.

As seen, the letter of September 29, 1982 was incorporated into the plea agreement by express reference in the record. At no time did the government object to the reference to the letter.

The contents of that letter explicitly show that the government, through United States Attorney David B. Helfrey, expressly represented to the Petitioner that the government would remain silent at sentencing. The September 29, 1982 letter from Mr. Helfrey states in pertinent part:

> Item 5 concerns the exercise of sentencing discretion by the United States District Court. *As indicated, the Government will not recommend any specific sentence or oppose any specific sentence.* The Government will, of course, file its Sentencing Memorandum and will be prepared to defend the allegations contained therein. (Emphasis added).
>
> Appendix, p. A29.

It is difficult to conceive of any manifestation by the United States Attorney that could be clearer on the point that the government would remain silent at sentencing. There can be no question that Petitioner was reasonable in relying on this representation by the government. Since the arraignment transcript shows the parties clearly intended the letter to be part of the plea agreement, the failure of the government to follow the promises contained in the letter constitutes exactly the same type of broken plea bargain as seen in *Santobello v. New York, supra.*

More evidence that the plea agreement was violated is found in the transcript of the sentencing hearing of December 6, 1982. Appendix, pp. A40-42. There, counsel for two defendants, immediately objected to the United States Attorney's statement in support of the maximum sentence. These statements on the record clearly indicate that Petitioner and his counsel, together with co-defendants had placed complete reliance on the terms of the plea agreement, including the fact that the government would remain silent at sentencing. Thus, Petitioner is entitled to all relief requested in the petition pursuant to 28 U.S.C. 2255.

The government denies that any agreement ever existed on the basis of certain language in Mr. Helfrey's September 29, 1982 letter. As shown previously, that letter began with an introduction stating "none of these matters are part and parcel of the plea agreement" followed by a "formal" declaration of "the government's position." See appendix, p. A28. On the basis of this language the government contends that it is not bound by the formal declaration that it would take no position at sentencing.

Under the constitutional principles of fairness, the government cannot use the hyper-literal construction of language to void performance of promises that have been made to criminal defendants. As the Seventh Circuit stated in *United States v. Bowler*, 585 F.2d 851 at 854 (1978):

> The Government will not be allowed to avoid the obligation it ... incurred by claiming now that the language literally promises nothing to the defendant. *A plea agreement is not an appropriate context for the Government to resort to a rigidly literal approach in the construction of language. Cf United States v. Brown*, 500 F.2d 375 (4th Cir. 1974) (holding that where the prosecutor promised to recommend a particular sentence, the mere half-hearted recitation of a suggested sentence would not satisfy the plea

> to insure the integrity of the plea bargaining process, the *'most meticulous standards of both promise and performance must be met by prosecutors engaging in plea bargaining.' Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973) (Emphasis added) 585 F.2d 854.

See also Brewer v. Williams, 430 U.S. 387, at 401 n.8; 51 L.Ed.2d 424, 97 S.Ct. 1232 (1977); *United States v. Swinehart*, 614 F.2d 853 (3d Cir. 1980).

Here, the government cannot employ its own literal construction of the phrase "part and parcel" to negate all of the representations made by the government to Petitioner in the letter of September 29. Without any clear manifestation by the government that it had absolutely no intention of being bound by that letter, Petitioner was completely justified in relying "upon the honor of the government in making and abiding by its proposals." *Cooper v. United States*, 594 F.2d 12, at 18 (4th Cir. 1979).

The fact that the September 29, 1982 letter was not placed officially on the record at the time of arraignment is irrelevant to the fact that the parties intended the letter to be a binding, operative part of the plea agreement. The arraignment transcript shows that the parties clearly intended that letter to be part of the plea agreement.

Two federal appellate courts have held that the failure of both parties to disclose to the trial court a government promise to take no position at sentencing necessitates the withdrawal of a guilty plea. The Tenth Circuit in *United States v. Blackner*, 721 F.2d 703 (10th Cir. 1983) stated:

> In any event, '[t]he parties are required to inform the trial judge of all the promises that have been made, *not only those which they happen to consider important' United States v. Roberts*, 570 F.2d 999, 1007

(D.C. Cir. 1977). (Emphasis added and footnote omitted). 721 f.2d at 708.

The Tenth Circuit went on to state:

> We agree with the Court of Appeals of the District of Columbia that *'[t]here is no standard short of requiring total disclosure of all material details of plea agreements* that can reliably guarantee that guilty pleas are knowing and voluntary and fully understood by the parties themselves. *Roberts*, 570 F.2d at 1007. (Emphasis added) 721 F.2d at 708.

In *United States v. Roberts*, 570 F.2d 999 (D.C. Cir. 1977) the District of Columbia Circuit stated:

> Not only did the Government fail to disclose the full terms of the plea agreement, but when the trial court asked the appellant if any promises had been made to induce his plea, he replied—incorrectly—that none had been. It is undisputed that the Government also had agreed not to ask for a maximum sentence, but neither party so informed the court at the time the plea was entered. The silence of Roberts on this point might well have been due to his feeling that this promise was insignificant, given the fact that he apparently understood that the Government would not ask for a substantial sentence of incarceration. However, the parties are required to inform the trial judge of all the promises that have been made, not only those which they happen to consider important.
>
> The promise not to recommend a maximum sentence seems by no means to be of negligible significance.... *But even if the parties considered it to be insignificant*, the court should have been apprised of this promise so that it could properly assess the fairness and voluntariness of the plea agreement. We do not suggest that there was any conscious effort at concealment by any of the parties; *the mere fact that there was not a full disclosure of the plea agreement is sufficient basis for granting Roberts' presentence motion to withdraw his plea.* There is no standard

> details of plea agreements that can reliably guarantee that guilty pleas are knowing and voluntary and fully understood by the parties themselves. (Emphasis added). *Roberts*, 570 F.2d at 1007.

Thus, even if the government did not consider its agreement not to take a position at sentencing significant in the contest of the entire plea agreement, it was required to inform the court of this agreement. In addition, the significance Petitioner attached to this single aspect of the plea bargain is manifested repeatedly beginning with the letter of September 29, 1982 by defense counsel, continuing with his letter of October 15, 1982, and culminating with the objections of Mr. Wyrsch, counsel for a co-defendant, and Mr. Schwartz, counsel for this Petitioner, upon the violation of the agreement.

The failure of Petitioner to disclose this single term of the agreement does not extinguish the government's commitment to take no position at sentencing. Both the government and Petitioner were under a duty to fully disclose all material details of the plea agreement. As the Court of Appeals stated in *Roberts:*

> The fact that the appellant himself in questioning by the court denied that there had been any prosecutorial promises to induce the plea does not estop him from seeking to withdraw his plea. The defendant's personal responses to Rule 11 inquiries are understandably likely to be inaccurate and somewhat confused, and they do not foreclose further investigation into the full terms of the plea bargain. *Indeed, the prosecutor, as well as the defendant, has an affirmative obligation to elaborate any promise that had been made,* and the court itself is mandated to direct its examination to both parties. (Footnotes omitted and emphasis added). 510 F.2d at 1007-1008.

See also Blackner v. United States, 721 F.2d 703, at 708 (10th Cir. 1983).

In this case both the prosecutor and the defendant had an affirmative duty to disclose all details of the plea agreement. Thus, the government is not in a position to argue that the failure of defense counsel to raise this point at arraignment waived Petitioner's right to enforce the promise since the government itself was bound by an even greater duty to disclose its commitment to take no position at the sentencing hearing beyond filing the sentencing memorandum. Again, the decision in *Roberts* is instructive:

> The Government is clearly wrong when it suggests that 'if there was any misunderstanding at that point about what it was that induced the plea, it was then and there [at the time of the Rule 11 proceedings that] counsel for the defendant himself should have brought the matter to the Court's attention.' (References to the record omitted) *All parties have an obligation to disclose the plea bargain fully to the court. But the government has a compelling duty fully to disclose its offer.* (Emphasis added). 570 F.2d at 1007, n. 25.

Therefore, the fact that defense counsel inadvertantly neglected to file the September 29, 1982 letter with the district court does not preclude the Petitioner from enforcing that agreement since the government also breached its duty to fully disclose the plea agreement.

The district court abused its discretion in denying Petitioner's petition under 28 U.S.C. 2255 since the record proves that the government did, in fact, breach the terms of the plea agreement. In fact, the record totally corroborates

the allegations made by Petitioner in his petition to the effect that the government breached the plea agreement. Therefore, Petitioner is entitled to withdraw his plea or be resentenced in front of another judge.

CONCLUSION

The Tenth Circuit's decision affirming the district court's order in the instant case is in conflict with the consistent decisions of this Court. Therefore, based upon the foregoing arguments and authorities, Petitioner respectfully requests this Court to grant this Petition for Certiorari.

Respectfully submitted,

/s/ Arthur M. Schwartz
Arthur M. Schwartz
ARTHUR M. SCHWARTZ, P.C.
1650 Market Street
Denver, Colorado 80202
(303)893-2500

APPENDIX

FILED MAY 2, 1985

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
PAUL C. "PAULIE" VILLANO,
Defendant-Appellant.

No. 84-1431
(D.C. No.82-CR-217-1)
(District of Colorado)

ORDER AND JUDGMENT

Before SEYMOUR and SETH, Circuit Judges, and SEAY, District Judge*.

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*Honorable Frank H. Seay, Chief Judge, Eastern District of Oklahoma, sitting by designation.

On October 4, 1982, defendant pleaded guilty to three felony counts pursuant to a plea bargain agreement entered into earlier and signed by the defendant and his attorney on October 4, 1982. On December 6, 1982, defendant was sentenced. About four months later defendant filed a Rule 35 Motion for Reduction of Sentence, which was denied on April 4, 1983. On May 25, 1983, defendant filed a Petition to Set Aside Sentence Pursuant to 28 U.S.C. §2255, and on October 20, 1983, defendant requested an evidentiary hearing on his petition. On November 2, 1983, the court ordered both sides to file affidavits. On February 6, 1984, the court heard oral arguments and accepted offers of evidence on defendant's petition. On February 7, 1984, the defendant made a second request for an evidentiary hearing. On March 16, 1984, the District Court entered orders denying defendant's request for an evidentiary hearing and denying defendant's Petition to Set Aside Sentence Pursuant to 28 U.S.C. §2255. The defendant filed this appeal on those two orders.

The defendant contends the trial court erred in denying an evidentiary hearing on his §2255 petition and in denying his petition. In his §2255 petition, defendant contends that the government violated their plea bargain agreement by failing to remain silent concerning defendant's sentence and recommending that defendant receive the maximum sentence.

On September 17, 1982, the defendant, by written statement, affirmed that he had committed the criminal activities alleged and further stated that a plea agreement had been entered between him and the United States.

On October 4, 1982, the defendant and his counsel signed a "Statement by Defendant in Advance of Plea"

which contained a reiteration of the plea agreement contained in the prosecutor's statement. The same two promises by the government are contained in both documents:

> (1) That the government will terminate any and all criminal investigations of the defendant for offenses referenced in the Sentencing Memorandum and the Information.
>
> (2) That the government will recommend against duplicate prosecution by another sovereign.

By letter dated September 28, 1982, the defendant's counsel, Mr. Schwartz, advised Justice Attorney David B. B. Helfrey that he was in receipt of the plea agreement. Mr. Schwartz further stated that he wished the government to review items described in his letter, which purported to add terms to the agreement, in order that those terms could be "included in paragraph 11 of the Statement by Defendant in Advance of Plea." The government's immediate response to Mr. Schwartz' letter was a letter from United States Department of Justice Attorney David B. B. Helfrey which stated, in part, "none of these matters are part and parcel of the plea agreement." This September 29 response continues in the first paragraph with: "It is further my understanding after our discussion of this date that you concur in this view." Approximately five days later, on October 4, 1982, before arraignment, defendant Villano and his attorney, Arthur M. Schwartz, had signed the "Statement by Defendant in Advance of Plea of Guilty" in its original form. That document was never changed. The terms of the plea in this statement do not include any of the nine items as set forth in Mr. Schwartz' September 28 letter. The terms include only the two promises contained in the plea agreement which is set forth in the Prosecutor's Statement and defendant's Statement in Advance of Plea. The defendant stated

that his document had been read and explained to him and that he had no questions regarding the contents of the plea bargain.

At the October 4, 1982, arraignment, the defendant stated that no promises of any kind had been made to him to induce or persuade him to plead guilty, other than those in the plea bargain agreement with the government. The Court requested that defense counsel confirm the promises that had been made and advise the Court if there were any other facts that should be brought to the Court's attention. The defense counsel stated that there had been no promises made "other than those contained in paragraph 11 of the plea agreement that was entered into...." At no time throughout the October 4, 1982, arraignment proceeding did defense counsel mention a promise by the government to remain mute at the sentencing, nor did the defense counsel, before the sentencing of December 6, 1982, file with the Court either his September 28 letter to the government or the government's September 29 response.

At sentencing on December 6, 1982, the government's position was that the defendant be given the maximum sentence. Following the government's comments, Mr. Schwartz approached the bench and stated it was his understanding that the government would stand mute at sentencing. The Court responded that there was nothing in the plea agreement before it that contained that promise. The Court then asked the defendant and his counsel if there was any reason why the Court should not pronounce sentence. At this point defense counsel stated he had none, neglecting to present Mr. Helfrey's September 29, 1982, letter or to press his contention that the plea bargain had been violated in any way.

At the hearing on defendant's §2255 petition on Febru-

ary 6, 1984, the letters of September 28 and 29, 1982, between Mr. Schwartz and Mr. Helfrey were finally filed with the court along with other correspondence and affidavits from both parties.

Based upon this expanded record, the District Court concluded that an evidentiary hearing was not necessary. We agree. Rules 7 and 8, *Rules Governing Section 2255 Proceedings; Blackledge v. Allison*, 431 U.S. 63 (1977). The defendant had full opportunity for presentation of all relevant facts by the expanded record. *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

The findings by the District Court were not clearly erroneous, as the clear, convincing, and substantial evidence of the expanded record conclusively shows there was no violation or breach of the plea agreement by the government and that the defendant was entitled to no relief. *Machibroda v. United States*, 368 U.S. 487 (1962); *Hedman v. United States*, 527 F.2d 20, 22 (10th Cir. 1975).

Accordingly, the orders of the District Court are affirmed.

/s/_____
Howard K. Phillips, Clerk

MAY TERM - July 12, 1985

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Frank S. Seay, District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
PAUL C. "PAULIE" VILLANO,
Defendant-Appellant.

No. 84-1431

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/_____
HOWARD K. PHILLIPS, Clerk

FILED MARCH 16, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 82-CR-217
Civil Action No. 83-JM-911

PAUL C. VILLANO
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ORDER

THIS MATTER is before me pursuant to 28 U.S.C. §2255. The petitioner claims that a statement in aggravation of his sentence made by the U.S. Attorney at the time of sentencing was contrary to the government's prior promise to remain silent; hence petitioner contends his plea and sentence should be vacated for violation of his plea agreement. I have examined the record and have concluded the government made no promise to remain mute.

The plea agreement which is at the base of this controversy was negotiated over a protracted period prior to the filing of charges. Without doubt the agreement contained substantial benefits for the petitioner for which he gave full consideration in his plea to three charges. I am satisfied now, as I was at the time of arraignment, that the bargain was fairly struck, and both parties gave as much as they received. Yet, I am equally certain that the government's silence as to sentence was not a part of the bargain.

I have examined the correspondence between petitioner's counsel and the chief prosecutor (exhibits A and B to the respondent's answer), which the petitioner urges contain the alleged provision and the government's assent, and I am unpersuaded. These letters were written after the written plea agreement was drafted, and they plainly address matters not included therein.

Clearly, exhibit A, the letter of Mr. Schwartz (petitioner's counsel) was an attempt to expand upon eight items which he wanted "disclosed" to me at sentencing as part of the plea agreement. One of the eight was that government counsel would "take no active part in opposing any sentence ... "[1]

Government's counsel, Mr. Helfrey, responded immediately. (Exhibit B.) Referring to Mr. Schwartz' eight points in his opening paragraph, Mr. Helfrey stated: "It is the Government's understanding, however, that none of these matters are part and parcel of the plea agreement." Thus, while generally assenting to "disclosure" of the eight points, Mr. Helfrey made it clear he assented to none as part of the existing plea agreement. Consequently, the record is clear to me that there never was a meeting of the minds that the government was bound by any agreement to remain mute on the issue of sentence.

Petitioner attempts to avoid the onus of this conclusion by pointing out various times in which the issue was alluded to without denial by the government. He suggests by its silence the government asserted its assent that the plea bargain contained the disputed term. The government

---

1 Although not clear in context, it is now argued this meant the government would remain mute.

responds that its silence was nothing more than a lack of concern for the issue in light of policy which suggests the government remain mute anyway. Notwithstanding, examination of the circumstances indicates no such assent.

Contrarily, at the time of arraignment, when I asked Mr. Schwartz to expand upon the "general terms" of the plea agreement, he failed to mention anything about the government's remaining mute. (Tr. arraignment p. 20, line 23, to p. 22, line 22.) This omission is to me more significant than the government's failure to deny the existence of such a promise.

It should also be noted, petitioner agreed to the government's filing of a damning "sentencing statement" which theoretically could have been far more harmful than any prosecutor's recommendation on sentencing. Despite petitioner's argument that the former was under seal and the latter was made in open court, both were directed to, and intended to impress, the Court in aggravation of the sentence. Under that circumstance, and in light of the substantial concessions that were made in the agreement by the government (exhibit E to respondent's answer), it hardly seems likely any promise to remain mute was a matter of significance to the petitioner prior to the entry of his plea.

Since I have concluded the best evidence of the plea bargain is set forth in the evidence already before me, I find no need for an evidentiary hearing. Accordingly, it is

ORDERED petitioner's motion for an evidentiary hearing and his prayer for relief are denied, and the petition is dismissed.

DATED at Denver, Colorado, this 16th day of March, 1984.

BY THE COURT:

/s/ _____
John P. Moore, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 82-CR-217
Civil Action No. 83-JM-911

PAUL C. VILLANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ORDER

Upon the motion of petitioner, the Court having determined sufficient facts have been presented by affidavit to resolve the issues, it is

ORDERED the second motion for evidentiary hearing (filed February 7, 1984) is denied.

DATED at Denver, Colorado, this 16th day of March, 1984.

BY THE COURT:

/s/ _____
John P. Moore, Judge
United States District Court

UNITED STATES DISTRICT COURT,
DISTRICT OF COLORADO

Case No.

PETITION TO SET ASIDE SENTENCE
PURSUANT TO 28 U.S.C., SECTION 2255

PAUL C. VILLANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

THE PROCEEDINGS CONTAINED HEREIN INVOLVE THE FOLLOWING:

Name: Paul C. Villano

Prison No: No number has been assigned

Place of Confinement: Federal Correction Institute in Ft. Worth, Texas; Sentence to Commence Being Served June 1, 1983

United States District Court, District of Colorado
Criminal Case No. Pursuant to Which These Proceedings Are Filed: 82CR217

UNITED STATES DISTRICT COURT,
DISTRICT OF COLORADO

Case No.

PETITION TO SET ASIDE SENTENCE
PURSUANT TO 28 U.S.C., SECTION 2255

PAUL C. VILLANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

COMES NOW the Petitioner, Paul C. Villano, by and through his attorney, Arthur M. Schwartz, P.C., and pursuant to 28 U.S.C., Section 2255, respectfully moves this Honorable Court for an order vacating and setting aside the sentence of Court heretofore entered, for the reasons and upon the information hereinafter set forth:

1. The Court which entered judgment of sentence of Petitioner is the United States District Court for the District of Colorado.

2. The date of sentence of this Court was entered on December 6, 1982.

3. The sentence entered on the counts plead to by this Petitioner total 10 years.

4. The nature of the offenses to which the Petitioner plead guilty are as follows:

   a. Title 18, United States Code, Section 371.

   b. Title 18, United States Code, Sections 922 and 924.

c. Title 26, United States Code, Section 7206.

5. Petitioner plead guilty to each of the charges, aforementioned, pursuant to an agreement with the Respondent. Hence, no trial was had on any of the counts charged.

6. Throughout the entirety of the criminal proceedings, Petitioner did not at any time testify.

7. Petitioner at no time appealed the sentence of this Court.

8. Although Petitioner did not appeal the sentence of this Honorable Court, Petitioner did in fact apply to the Court for a reduction of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure.

Said Motion was denied by this Honorable Court, and as much, it is the original sentence imposed by this Court at the time the plea was accepted from which the Petitioner seeks relief.

9. Petitioner did not appeal the denial of his request for relief filed pursuant to Rule 35, Federal Rules of Criminal Procedure.

10. Petitioner seeks to set aside the sentence imposed by this Honorable Court and to have the matter of sentencing reheard, or in the alternative, to withdraw his pleas of guilty and proceed to trial for the following express reasons:

a. The pleas tendered by the Petitioner, and accepted by this Court, were the result of extensive plea negotiations which occurred in meetings between the Petitioner and United States attorneys in the cities of Denver, Colorado; Kansas City, Missouri; and Washington, D.C.

b. The plea agreement which culminated those negotiations included an obligation on the part of the Respondent not to recommend any specific sentence, or to oppose any specific sentence. The United States, Respondent herein, would be allowed to file a sentencing memorandum, and would also be permitted to defend the veracity of the allegations contained in that memorandum should the accuracy of the allegations be challenged by the Petitioner pursuant to an evidentiary hearing.

c. Other matters contained within the plea agreement are more fully set forth in a letter dated September 29, 1982, marked as Exhibit A, attached hereto and incorporated herein by this reference.

11. Petitioner affirmatively alleges that the Respondent breached its plea agreement with Petitioner, over the objection of Petitioner's attorney and the objection of other attorneys representing various other defendants, by the action of the United States Attorney, Robert Miller, during the course of the sentencing hearing before this Honorable Court. The Respondent, through Mr. Miller, breached its agreement with the Petitioner in a calculated, predetermined, and designed manner, in the following express particulars:

a. Contrary to the provision of the plea agreement that the Respondent would not recommend any specific sentence, nor oppose any specific sentence (See Exhibit A, "Item 5," page 2), the United States Attorney stated at the sentencing hearing: "Therefore, the government's position is that these gentlemen *ought to be given the maximum sentence of 13 years and $20,000.*" (A copy of the pertinent portions of the sentencing hearing transcript is marked as Exhibit B, attached hereto and incorporated herein by this

reference. The statement of the United States Attorney, emphasis supplied, can be found at page 24, lines 15 through 17, inclusive. Other relevant statements made by the United States Attorney, all in violation of the plea agreement entered into between the Petitioner and the Respondent, can be found in Exhibit B, beginning at page 22, line 23, and continuing through page 24, line 17. Relevant statements made by Petitioner's counsel, and Petitioner, can be found in Exhibit B, beginning at page 13, line 22, and continuing through page 18, line 21.)

b. As mentioned previously, Petitioner requested a reconsideration of his sentence pursuant to Rule 35, Federal Rules of Criminal Procedure. In further violation of its agreement with the Petitioner, Respondent filed a response to Petitioner's Motion for Reduction of Sentence, which strongly opposed Petitioner's Motion and which was calculated to encourage a maximum sentence despite Respondent's obligation pursuant to the plea agreement not to recommend any specific sentence, nor to oppose any specific sentence.

12. The actions of the Respondent in breaching the plea agreement entered into with the Petitioner, as more fully set forth in paragraphs 11(a) and (b) of this Petition, inclusive, require that a rehearing concerning sentencing be granted to this Petitioner, or that Petitioner be granted an opportunity to withdraw his plea and proceed to trial.

The United States Supreme Court decision in *Santobello v. New York*, 404 U.S. 257 (1971), a copy of which is marked as Exhibit C, attached hereto and incorporated herein by this reference, is precisely on point with the instant case and is dispositive in favor of granting the relief sought by the Petitioner herein.

Another case precisely on point with the instant case, *United States v. Arnett*, 628 F.2d 1162 (9th Cir. 1979), is marked as Exhibit D, attached hereto and incorporated herein by this reference.

13. Petitioner affirmatively alleges that this Honorable court in denying Petitioner's Rule 35 Motion determined that the statements of the Respondent did not in fact influence this Court's opinion; however, for the reasons as contained herein, whether or not those statements influenced the Court are not the determining factor of whether Petitioner is entitled to the relief he seeks. (See Exhibits C and D attached hereto and incorporated herein by this reference).

14. Petitioner does not have any petition or appeal now pending in any court other than this Petition under which he is currently proceeding.

15. The attorney who represented Petitioner in all of the stages of the proceeding, and continues at present to represent Petitioner is:

Arthur M. Schwartz, P.C.
1650 Market Street
Denver, Colorado 80202
(303) 893-2500

15. The Petitioner has no other sentences to serve other than the sentence imposed by the judgment of this Court which sentence is under attack by these proceedings.

WHEREFORE, Petitioner prays that this Honorable Court grant to him all the relief which he may be entitled to pursuant to 28 U.S.C., Section 2255 and the applicable case law pertaining thereto.

Respectfully submitted,

/s/ _____

ARTHUR M. SCHWARTZ, P.C.
#557
1650 Market Street
Denver, CO. 80202
893-2500

VERIFICATION

STATE OF COLORADO

ss.

City and County of Denver

I, PAUL C. VILLANO, being of lawful age, and after having been first duly sworn upon oath, depose and state:

That I am the Petitioner in the above and foregoing action; that I have read the above and foregoing Petition to Set Aside Sentence, and the statements as set forth therein are true and correct to the best of my knowledge, information and belief.

/S/_____

Paul C. Villano

The above and foregoing was subscribed and sworn to before me this 24 day of May, 1983.

My commission expires: November 20, 1985

_____

Notary Public
1650 Market Street
Denver, CO. 80202

UNITED STATES DISTRICT COURT,
DISTRICT OF COLORADO

Case No. 83-JM-911

REQUEST FOR EVIDENTIARY HEARING PURSUANT TO 28 U.S.C. §2255, AND FOR AN ORDER PRODUCING THE PETITIONER AT SAID EVIDENTIARY HEARING

PAUL C. VILLANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

COMES NOW the Petitioner, Paul C. Villano, by and through his attorney, Arthur M. Schwartz, P.C., and pursuant to 28 U.S.C., §2255, respectfully requests that this Honorable Court conduct an evidentiary hearing to determine the issues raised by Petitioner at this Court's earliest convenience.

AND AS GROUNDS FOR SAID REQUEST Petitioner states:

1. Pursuant to 28 U.S.C. §2255, Petitioner has filed with this Court a Petition seeking to set aside the sentence imposed on Petitioner, or in the alternative, to withdraw his plea of guilt in case number 82CR217.

2. The basis for the relief requested by Petitioner, as alleged in his original petition pursuant to 28 U.S.C. §2255, is that the Government breached its plea agreement with

the Petitioner by taking a position with respect to sentencing, and by objecting to Petitioner's Motion for Reduction of Sentence previously filed pursuant to Rule 35, Federal Rules of Criminal Procedure.

3. On or about October 12, 1983, the Government filed its response to Petitioner's 2255 Motion, which response consisted almost entirely of a denial that an agreement along the lines alleged by Petitioner ever existed. After numerous requests by Petitioner's counsel, a copy of the Government's response was finally delivered to Petitioner on October 19, 1983.

4. Petitioner is prepared to produce documents and testimony from various witnesses that will conclusively prove that the agreement as alleged by Petitioner did in fact exist, and was in fact breached by the Government.

5. Petitioner is also prepared to present documents and testimony that will demonstrate that the Government was fully aware of this agreement with the Petitioner, that the Government knowingly violated this agreement, and that the Government's response to Petitioner's allegations is disingenuous.

6. That the Petitioner is one of the witnesses that will be called to testify at the time of the evidentiary hearing, and thus, Petitioner's presence at said hearing is necessary.

7. By the express terms of 28 U.S.C. §2255, a prompt hearing should be granted to the Petitioner herein, and this Court has the authority to require the production of the Petitioner at the time of said hearing.

8. That if in fact an agreement was made as alleged by Petitioner, case law unequivocally supports Petitioner's position with respect to the merits of his claim and the relief to be granted.

WHEREFORE, Petitioner respectfully requests that this Court grant to him an evidentiary hearing to allow the Petitioner an opportunity to prove the veracity of the allegations contained in the Petition, and for this Court to order the production of the Petitioner at the time of said hearing.

Respectfully submitted,

ARTHUR M. SCHWARTZ, P.C.
1650 Market Street
Denver, CO 80202
(303) 893-2500

UNITED STATES DISTRICT COURT,
DISTRICT OF COLORADO

Case No. 83-JM-911

SECOND MOTION FOR EVIDENTIARY HEARING PURSUANT TO 28 U.S.C., SECTION 2255, AND FOR AN ORDER PRODUCING THE PETITIONER AT SAID EVIDENTIARY HEARING

PAUL C. VILLANO,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

COMES NOW the Petitioner, Paul C. Villano, by and through his attorney, Arthur M. Schwartz, P.C., and pursuant to 28 U.S.C., Section 2255, respectfully renews his request that this Honorable Court conduct an evidentiary hearing to determine the issues raised by Petitioner at this Court's earliest convenience.

AS GROUNDS FOR SAID MOTION, Petitioner states:

1. Pursuant to 28 U.S.C., Section 2255, Petitioner has filed with this Court a Petition seeking to set aside the sentence imposed on Petitioner, or in the alternative, to withdraw his plea of guilty in case No. 82CR217.

2. The basis for the relief requested by Petitioner, as alleged in his original petition pursuant to 28 U.S.C., Section 2255, is that the Government breached its plea

agreement with the Petitioner by taking a position with respect to sentencing, and by objecting to Petitioner's Motion for Reduction of Sentence previously filed pursuant to Rule 35, Federal Rules of Criminal Procedure.

3. On October 20, 1983, the Petitioner herein submitted a Request for Evidentiary Hearing Pursuant to 28 U.S.C., Section 2255, and For an Order Producing the Petitioner at Said Evidentiary Hearing. A copy of said request is attached hereto and incorporated herein by this reference.

4. On November 30, 1983, this Honorable Court issued a Minute Order which scheduled oral argument for February 6, 1984, and which provided that following oral argument the court would determine the necessity for the taking of testimony.

5. On February 6, 1984, oral argument was in fact presented to this Court, but the elicitation of testimony was not permitted.

6. It is abundantly clear, on the basis of the arguments presented to the Court, that there is a serious factual dispute with respect to a material issue. Petitioner now desires to supplement the record by providing testimony of various persons who were eyewitnesses to the plea negotiations, and present various documents, including but not limited to, motions and affidavits previously filed by the attorneys for Petitioner's co-defendants, which documents corroborate the Petitioner's allegations.

7. Petitioner cites the following authority in support of the within Motion:

a. *Blackledge v. Allison,* 431 U.S. 63 (1977).
b. *Fontaine v. United States,* 411 U.S. 213 (1973).
c. *Machibroda v. United States,* 368 U.S. 487 (1962).

d. *Crow v. United States*, 397 F.2d 284 (10th Cir. 1968).
e. *United States v. McCord*, 618 F.2d 389 (5th Cir. 1980).
f. *United States v. McCarthy*, 433 F.2d 591 (1st Cir. 1970).
g. *United States v. Rapp*, 439 F.2d 1156 (8th Cir. 1976).
h. *Dugan v. United States*, 521 F.2d 231 (5th Cir. 1975).

WHEREFORE, Petitioner respectfully requests that this Honorable Court conduct an evidentiary hearing, and order the production of the Petitioner at said hearing, for the reasons enumerated herein.

Respectfully submitted,

ARTHUR SCHWARTZ, P.C.
Bradley Jay Reich #10663
1650 Market Street
Denver, CO. 80202
893-2500

LAW OFFICES OF
ARTHUR M. SCHWARTZ, P.C.
THE MARKET CENTER
1650 MARKET STREET
DENVER, COLORADO 80202

September 28, 1982

Mr. David Helfree (sic)
United States Attorney
Department of Justice
Suite 601, 1125 Grand Avenue
Kansas City, Missouri 64106

Re: Paul Villano

Dear Mr. Helfree (sic):

I have reviewed the documents given to me by you concerning the plea agreement of Paul Villano.

Pursuant to that agreement I direct your attention to paragraph 11 which represents to the Court that the only agreement entered into by the parties is as set forth in that paragraph.

Upon due reflection it would appear to me that there should be fully disclosed to the court the nature and extent of all agreements entered into between Mr. Villano and the government so that the court will be fully apprised and those agreements enforceable.

To this end, it would appear to me that the following additional disclosures be made to the court:

1. That this agreement shall terminate each and every criminal investigation of Mr. Villano by the United States to the end that the plea made by Mr. Villano shall discharge all other potential investigations of him for previous conduct.

2. The plea made by Mr. Villano will terminate all investigations for criminal sanctions on any tax return heretofore filed by him through the year 1981.

3. Letters will be obtained from the Counties of Denver, Jefferson, Arapahoe and Adams disclosing that the District Attorneys of those Counties will not commence any criminal prosecutions of Mr. Villano by virtue of any past alleged criminal conduct in that any of those alleged activities will have been merged into this plea.

4. That no steps will be taken on behalf of the State of Colorado or the City of Denver to close Gaetano's Restaurant as a public nuisance.

5. That you will take no active part in opposing any sentence entered by the Court other than to present to the Court the sentencing memorandum previously tendered to Mr. Villano.

6. While it is not binding upon the court or the Bureau of Prisons, you agree to inform the Bureau of Prisons at my request that you have no objection to Mr. Villano being sent to the facility at Fort Worth because of his on-going degenerative physical condition.

7. You will return to Mr. Villano all monies seized at the time a search warrant was executed against his home and Gaetano's Restaurant.

8. You will return those funds taken from Mr. Villano's home which represent rental monies and belong to his mother, and in addition, shall return to her all keys taken at the time of the search.

9. The government will not cause an investigation or prosecution against Mr. Villano's mother, sister or brother-in-law and this plea shall represent an end of all on-going investigations of them.

It would seem to me that unless these items are in fact spelled out in paragraph 11 that the court does not have notification of the extent of the agreement and quite frankly the agreement cannot in any way be used as protection for my client to prevent future problems from arising.

I therefore would urge you since the matter is most urgent to review these items so that they may be included in paragraph 11 of Statement of Defendant in Advance of Plea.

Very truly yours,

/s/_____

ARTHUR M. SCHWARTZ, P.C.

Suite 601
1125 Grand Avenue
Kansas City, Missouri 64106

September 29, 1982

Mr. Arthur M. Schwartz, P.C.
The Market Center
1650 Market Street
Denver, Colorado 80202

Re: Your letter, September 28, 1982

Dear Mr. Schwartz:

In regards to your above-referenced letter, I certainly share your belief that all matters which are part of the plea bargain reached by your client, Paul Villano, and the Government should be made available to the Court pursuant to Rule 11, Federal Rules of Criminal Procedure. It is the Government's understanding, however, that none of these matters are part and parcel of the plea agreement. It is further my understanding after our discussion of this date that you concur in this view.

Let me, however, address each item raised by you and formally state the Government's position. Items 1 and 2 deal with the possible future institution of federal criminal charges against your client. The terms of the plea agreement provides the plea "will terminate any and all criminal investigations of [your client] by the United States Grand Jury, District of Colorado, and the United States Government for offenses discussed and referenced in the Information and the Sentencing Memorandum." I believe this language clearly precludes any further prosecution by the United States of your client for any offense referenced in

the Sentencing Memorandum including criminal tax offenses. I note you have previously been provided with a copy of the Sentencing Memorandum the Government intends to file once your client's plea has been accepted by the Court.

Item 3 concerns the possible filing of local charges concerning matters covered in the plea agreement. The United States has agreed to recommend against the prosecution of your client by any other sovereign for these same or related offenses referenced in the Sentencing Memorandum or the Information. Obviously, this would include such a recommendation to local and State of Colorado prosecutors as well. However, as you are aware the United States is not in any position to bind the independent judgment of a local prosecutor. I am not in possession of any information which would suggest any local or state prosecutor intends to file any charges against your client arising out of this federal investigation. I have discussed this federal investigation with Dale Tooley, District Attorney, Denver County.

Item 4 concerns the possible closing of Gaetano's Restaurant as a public nuisance. Again, the United States is in no position to intervene in the exercise of local governmental discretion. I am, however, unaware of any such intention and until you raised the matter in your letter was unaware that such a closure was even possible.

Item 5 concerns the exercise of sentencing discretion by the United States District Court. As indicated, the Government will not recommend any specific sentence or oppose any specific sentence. The Government will, of course, file its Sentencing Memorandum and will be prepared to defend the allegations contained therein.

Item 6 concerns the exercise of the Bureau of Prisons' discretion in designating your client's place of confinement if sentenced to a period of incarceration. It is the Government's position that such designation is a matter within the discretion of the appropriate Bureau of Prisons' personnel. The Government will not oppose Mr. Villano being designated to serve any imprisonment at FCI, Ft. Worth, Texas, and is quite willing to indicate this to the Court and/or the Bureau of Prisons.

Items 7 and 8 concern the return of items seized at Gaetano's Restaurant and at the residence of Paul Villano. Since the charges contained in the Information do not permit forfeitures, all items seized pursuant to search warrant, except the firearms, will be returned to those parties from which they were seized. It is my understanding that the rental monies, approximately $1,200, and certain keys will be returned to client's mother. This is based upon your client's assertion that that property is his mothers and not his property. I would appreciate it if you would have your client and his mother sign such a sworn statement for our records. The return of property will take place immediately after the Court's acceptance of the plea of your client. Any additional monies will be applied to any existing unpaid fine or fines arising from this prosecution. Any sums available after payment of any fines will be returned to the owner.

Item 9 concerns possible investigation by the United States or the prosecution of your client's mother, sister or brother-in-law. Obviously such assurances are not part of any plea bargain between the United States and your client. However, I can state that those individuals are not currently the subject of investigations by the United States

and I am unaware of any grounds to conduct such investigations or prosecutions or of any intention of any of the agencies involved in this matter to open any such investigations.

Hopefully, the above clarifies the points raised in your letter. If you desire to discuss these matters any further, as always, I am at your service.

Sincerely,

David B. B. Helfrey
Attorney-In-Charge
Kansas City Strike Force
Organized Crime and
Racketeering Section

DBBH:ar
cc: Robert Miller,
United States Attorney
William Gavin,
Federal Bureau of Investigation
Jimmy Martin,
Internal Revenue Service

LAW OFFICES OF ARTHUR M. SCHWARTZ, P.C.
THE MARKET CENTER
1650 MARKET STREET, DENVER, COLORADO 80202

October 15, 1982

Robert Gay Guthrie, Attorney at Law
1961 Stout Street, Denver, CO. 80294

Re: Paul C. Villano

Dear Mr. Guthrie:

With reference to the Motion for Disclosure of certain tape recordings in the above case, please be advised that I would like an opportunity to hear those tapes or review written transcripts of same at a time convenient to you.

I am also concerned that the order reflects that they may be used by "counsel and the court." It is my understanding that the government in the plea bargain with Mr. Villano has agreed that it will take no position on sentencing other than the written sentencing report heretofore filed with the court.

I therefore fail to understand, absent a contested evidentiary hearing, why that language appears in the order forwarded to me. I therefore would appreciate it if you would clarify same so that we will have no misunderstanding concerning same.

My sincere personal regards.

Very truly yours,

ARTHUR M. SCHWARTZ, P.C.
AMS/bjk
cc: David B. Helfree (sic)

U.S. DEPARTMENT OF JUSTICE

Suite 601
1125 Grand Avenue
Kansas City, Missouri 64106

Washington, D.C. 20530

October 20, 1982

Arthur M. Schwartz, P.C.
The Market Center
1650 Market Street
Denver, Colorado 80202

Re: Paul Villano, No. 82-CR-217
Use of Title III Material by Government

Dear Mr. Schwartz:

I have received a copy of your letter of October 15, 1982, concerning use of the court-authorized electronic surveillance during the sentencing of your client. The purpose of the language authorizing the Government to make use of the electronic surveillance materials is in the event that the Government sentencing memorandum is challenged by your client. As agreed, the United States is prepared to defend the accuracy of the sentencing memorandum. As your letter acknowledges, and to which the Government agrees, no recordings or evidence will be adduced by the Government at the sentencing of your client absent a contested evidentiary hearing.

I believe this position is in accordance with our preexisting understanding.

Sincerely,

David B. B. Helfrey
Attorney in Charge
Kansas City Strike Force
Organized Crime and
Racketeering Section

DBBH: dls

cc: Robert N. Miller
Attn: Guthrie
Judge John Moore

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Criminal Action Nos. 82-CR-215, 82-CR-216, 82-CR-217
UNITED STATES OF AMERICA,
Plaintiff,
vs.
EUGENE "CHECKERS" SMALDONE,
CLARENCE M. "CHAUNCEY" SMALDONE, and
PAUL C. VILLANO,
Defendants.

REPORTER'S TRANSCRIPT
(Arraignment)

Proceedings before the HONORABLE JOHN P. MOORE, Judge, United States District Court for the District of Colorado, commencing at 8:27 a.m. on the 4th day of October, 1982, in Courtroom C-335, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:	ROBERT N. MILLER United States Attorney ROBERT GAY GUTHRIE Assistant U. S. Attorney 1200 Federal Office Building 1961 Stout Street, Drawer 3615 Denver, Colorado 80294 DAVID HELFREY United States Attorney Suite 601, 1125 Grand Avenue Kansas City, Missouri 64106
For the Defendant - Eugene "Checkers" Smaldone:	PETER H. NEY Attorney at Law 1869 West Littleton Boulevard Littleton, Colorado 80120
For the Defendant - Clarence M. "Chauncey" Smaldone:	JANE S. HAZEN Attorney at Law 1616 Glenarm Place, #2950 Denver, Colorado 80202 JAMES R. WYRSCH Attorney at Law 1050 Home Savings Building Kansas City, Missouri 64106
For the Defendant - Paul C. Villano:	ARTHUR M. SCHWARTZ Attorney at Law 1650 Market Street Denver, Colorado 80202

MR. SCHWARTZ: If your Honor please, concerning paragraph 1 which sets out the government's agreement with the defendant Paul Villano, I took it upon myself to confer with the United States Attorney's office because I did not feel that it adequately reflected the agreement that was entered into by the parties. In doing that I propounded specific questions to the United States Attorney by letter and which Mr. Helfrey then responded in kind. That letter is dated September 29, 1982, and I can either recite the general terms of it to the Court or file the letter with the Court, whichever the Court choses.

THE COURT: I would like to know what the general terms are and I would like a copy placed of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Criminal Action Nos. 82-CR-215, 82-CR-216, 82-CR-217
UNITED STATES OF AMERICA,
Plaintiff,
vs.
EUGENE SMALDONE,
CLARENCE M. SMALDONE, and
PAUL C. VILLANO,
Defendants.

REPORTER'S TRANSCRIPT
Sentencing

Proceedings before the HONORABLE JOHN P. MOORE, Judge, United States District Court for the District of Colorado, commencing at 9:00 a.m. on the 6th day of December, 1983, in Courtroom C334, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:

ROBERT N. MILLER
United States Attorney
ROBERT GAY GUTHRIE
Assistant United States Attorney
1200 Federal Building
Denver, Colorado 80294

ROBERT E. MYDANS
Attorney - U.S. Department of Justice
Kansas City, Missouri

Celeste S. Rowdon, RPR
1929 Stout Street, Drawer 3562
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(303) 595-3053

For the Defendant - Eugene Smaldone:

PETER H. NEY
Attorney at Law
1869 W. Littleton Blvd.
Littleton, Colorado 80120

For the Defendant - Clarence M. Smaldone:

JAMES R. WYRSCH
Attorney at Law
1050 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106

For the Defendant - Paul C. Villano:

ARTHUR M. SCHWARTZ
Attorney at Law
1650 Market Street
Denver, Colorado 80202

THE COURT: Mr. Miller...

MR. MILLER: Thank you, your Honor, I will be very brief. I would like to clear up a couple of things. First of all, the government has never taken a position we have no objection of sending anybody a particular place. The government's position has been and continues to be that we have no position on where anybody is sent because that is a parole commission decision and not ours. We take no position on where these people should be sentenced to.

A couple of things, Judge, that I think striked myself, and I think would strike the Court in this case. First of all, the records of the defendants. These people have had records for years. One of the reasons that you give a defendant a break, as they have asked for this morning, is because there is a chance that maybe they will be rehabilitated or proved themselves in the past. These people have proved one thing that is that they will continue to commit crimes by their past records. I am sure the the Court will take that into consideration. The government views that as a serious matter in this these particular cases.

Finally the other point that I think strikes the Court and myself and others is the nature of these crimes. The one thing that nobody has talked about this morning is the possession of a silencer; and I think the Court has to view that charge in conjunction with the rest of them, particularly the loan sharking activity, and one can presume that you don't use a silence, or at least we don't in Greeley, to hunt jack rabbits with.

There is a presumption, an assumption I think surrounding tht charge itself that belis some of the other things that were said here this morning. There were people that were hooked, that were squeezed for these exorbitant loans, 5 percent a day in some cases.

The rehabilitation hasn't worked on these gentlemen. They are old and some of them are sick, but I presume that they have been old and sick at the very times that they were committing these crimes and that didn't deter them for that.

I would say that the Court only really has a couple options left in terms of why we sentence people and that is to punish them, to punish them for violating serious laws of this society, which they have done for years, and finally and probably most importantly for the protection of society that is left out there.

Therefore, the government's position is that these gentlemen ought to be given the maximum sentence of 13 years and $20,000. Thank you.

MR. WYRSCH: Your Honor, I think we need approach the bench.

THE COURT: All right.

(Whereupon, there was a discussion on the record had at the bench, to-wit:)

MR. WYRSCH: Your Honor, plea bargaining in this case no specifically mentioned that the government would remain mute to sentence—

THE COURT: I don't remember that as part of the plea bargain.

MR. SCHWARTZ: It was my understanding, your Honor, that unless we contested the sentencing memorandum filed with the government to the end that we put on evidence contradicting it that the government would stand mute.

THE COURT: I don't find anything in the plea agreement that I have before me that indicates that. As far as I am concerned the government has its right under the rule, and they have done nothing more than exercise that right. I don't think anything they have done is contrary to the plea agrement that I have before me. Thank you gentlemen.